

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

FTX TRADING LTD., *et al.*,¹

Debtors.

Chapter 11

Case No. 22-11068 (JTD)

(Jointly Administered)

Hearing Date: September 13, 2023 at 1:00 p.m. (ET)

Objection Deadline: September 6, 2023 at 4:00 p.m. (ET)

**DEBTORS' FIFTH OMNIBUS MOTION FOR ENTRY OF AN ORDER
AUTHORIZING THE DEBTORS TO REJECT CERTAIN EXECUTORY CONTRACTS
EFFECTIVE AS OF THE REJECTION DATE**

**PARTIES RECEIVING NOTICE OF THIS OMNIBUS MOTION SHOULD LOCATE
THEIR NAMES AND CORRESPONDING CONTRACTS IN EXHIBIT 1 TO THE
PROPOSED ORDER ATTACHED TO THE MOTION.**

FTX Trading Ltd. ("FTX Trading") and its affiliated debtors and debtors-in-possession (collectively, the "Debtors") hereby submit this motion (this "Motion") for entry of an order, substantially in the form attached hereto as Exhibit A (the "Order"), pursuant to sections 105(a) and 365(a) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") and rule 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing the Debtors to (a) reject the ten executory contracts set forth on Exhibit 1 to the Order (each, a "Contract," and collectively, the "Contracts"), effective as of August 30, 2023 (the "Rejection Date") and (b) take such action as may be necessary to implement and effectuate the rejection of the Contracts. In support of this Motion, the Debtors respectfully state as follows:

¹ The last four digits of FTX Trading Ltd.'s and Alameda Research LLC's tax identification number are 3288 and 4063 respectively. Due to the large number of debtor entities in these Chapter 11 Cases, a complete list of the Debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at <https://cases.ra.kroll.com/FTX>. The principal place of business of Debtor Emergent Fidelity Technologies Ltd is Unit 3B, Bryson's Commercial Complex, Friars Hill Road, St. John's, Antigua and Barbuda.

Background

1. On November 11 and November 14, 2022, the Debtors filed with the United States Bankruptcy Court for the District of Delaware (the “Court”) voluntary petitions for relief under the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Joint administration of the Debtors’ cases (the “Chapter 11 Cases”) was authorized by the Court by entry of an order on November 22, 2022 [D.I. 128]. On December 15, 2022, the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”) appointed an Official Committee of Unsecured Creditors (the “Committee”) pursuant to section 1102 of the Bankruptcy Code [D.I. 231].

2. Additional factual background relating to the Debtors’ businesses and the commencement of these Chapter 11 Cases is set forth in the *Declaration of John J. Ray III in Support of Chapter 11 Petitions and First Day Pleadings* [D.I. 24], the *Declaration of Edgar W. Mosley II in Support of Chapter 11 Petitions and First Day Pleadings* [D.I. 57], the *Supplemental Declaration of John J. Ray III in Support of First Day Pleadings* [D.I. 92] and the *Supplemental Declaration of Edgar W. Mosley II in Support of First Day Pleadings* [D.I. 93].

Facts Specific to the Relief Requested

3. The Debtors and their advisors are in the process of reviewing and analyzing the Debtors’ outstanding contracts. Based upon this analysis, the Debtors have determined, in their business judgment, that there is no longer a need for, or benefit to the Debtors or their estates to maintain, the Contracts going forward. Rejection of each of the Contracts as of the Rejection Date would benefit the Debtors’ estates because it will enable the Debtors to avoid the accrual of any obligations related to goods and/or services provided under the Contracts described below that are not needed by the Debtors or their estates.

4. The first Contract is a Master Services Agreement, by and between BallotReady, Inc. and Debtor Deck Technologies Inc. (“Deck Technologies”), dated as of August 15, 2022, and all related agreements, order forms, schedules, addenda and statements of work thereto. This Contract provides the terms and conditions pursuant to which Deck Technologies may order certain software-as-a-service products from BallotReady, Inc.

5. The second Contract is an API Contract, by and between BallotReady, Inc. and Deck Technologies, dated as of August 15, 2022, and all related agreements, order forms, schedules, addenda and statements of work thereto. Pursuant to this Contract, BallotReady provides Deck Technologies with access to certain application programming interfaces.

6. The third Contract is a Master Services Agreement and Order Form, by and between Civis Analytics, Inc. and Deck Technologies, dated as of August 12, 2022, and all related agreements, order forms, schedules, addenda and statements of work thereto. Pursuant to this Contract, Civis Analytics, Inc. provides Deck Technologies certain data and analytics services.

7. The fourth Contract is a Services Agreement, by and between Critical Mention, Inc. and Deck Technologies, dated as of September 15, 2022, and all related agreements, order forms, schedules, addenda and statements of work thereto. Pursuant to this Contract, Critical Mention, Inc. provides Deck Technologies certain services related to Critical Mention, Inc.’s media monitoring content.

8. The fifth Contract is an API Limited License and Confidentiality Agreement, by and between Open Secrets (OS) and Deck Technologies, dated as of October 21, 2022 and made effective as of October 1, 2022, and all related agreements, order forms, schedules, addenda and statements of work thereto. Pursuant to this Contract, Open Secrets (OS) licenses to Deck Technologies certain data and provides related services.

9. The sixth Contract is a Master Services Agreement and Statement of Work, by and between TargetSmart Communications, LLC and Deck Technologies, dated as of June 13, 2019 and July 20, 2022, respectively, and all related agreements, order forms, schedules, addenda and statements of work thereto. Pursuant to this Contract, TargetSmart Communications, LLC licenses to Deck Technologies the use of its proprietary voter and consumer information database and provides certain services related thereto.

10. The seventh Contract is an End User License Agreement, by and between TeamViewer Germany GmbH (“TeamViewer”) and Debtor Alameda Research LLC (“Alameda”), dated as of July 16, 2020, and all related agreements, order forms, schedules, addenda and statements of work thereto. Pursuant to this Contract, TeamViewer provides Alameda certain licenses and services related to TeamViewer’s proprietary remote access and remote control computer software.

11. The eighth Contract is the End User License Agreement, by and between TeamViewer Germany GmbH (“TeamViewer”) and Debtor West Realm Shires Services Inc. (“WRSS”), dated as of July 27, 2022, and all related agreements, order forms, schedules, addenda and statements of work thereto. Pursuant to this Contract, TeamViewer provides WRSS certain licenses and services related to TeamViewer’s proprietary remote access and remote control computer software.

12. The ninth Contract is a Service Agreement, by and between Transparency USA, LLC and Deck Technologies, dated as of September 27, 2022, and all related agreements, order forms, schedules, addenda and statements of work thereto. Pursuant to this Contract, Transparency USA, LLC provides Deck Technologies certain election campaign contribution and campaign finance report data in some U.S. states.

13. The tenth Contract is an Order Form and related Twilio Platform Agreement, by and between Twilio Inc. and WRSS, dated as of February 28, 2022 and February 25, 2022, respectively, and all related agreements, order forms, schedules, addenda and statements of work thereto. This Contract provides that Twilio Inc. will provide WRSS certain products and services related to a proprietary customer data platform.

Jurisdiction

14. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in the Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a) and 365(a) of the Bankruptcy Code and Bankruptcy Rule 6006. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, the Debtors consent to the entry of a final order or judgment by the Court in connection with this Motion to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

Relief Requested

15. By this Motion, the Debtors request entry of the Order, substantially in the form attached hereto as Exhibit A, authorizing the Debtors to (i) reject the Contracts, effective as of the Rejection Date and (ii) take such actions as may be necessary to implement and effectuate the rejections of the Contracts. The Debtors and their estates reserve any and all rights to assert that the Contracts are not executory contracts, and nothing included in, or omitted from, this Motion shall impair, prejudice, waive or otherwise affect such rights.

Basis for Relief

A. Rejection of the Contracts Reflects the Debtors' Business Judgment.

16. The Debtors have determined that the Contracts are not integral to the Debtors' chapter 11 efforts, are not otherwise beneficial to the Debtors' estates and present burdensome liabilities. Accordingly, the Debtors' decision to reject the Contracts is an exercise of business judgment, and the rejection should be approved.

17. Section 365(a) of the Bankruptcy Code provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). "Courts may use § 365 to free a [debtor] from burdensome duties that hinder its reorganization." *In re Exide Techs.*, 607 F.3d 957, 967 (3d Cir. 2010); *NLRB v. Bildisco & Bildisco (In re Bildisco)*, 465 U.S. 513, 528 (1984) ("[T]he authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization.").

18. The Debtors' rejection of an executory contract is governed by the "business judgment" standard, which requires a debtor to have determined that the requested rejection would benefit its estate. *See In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982), *aff'd*, 465 U.S. 513 ("The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the 'business judgment' test."); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39–40 (3d Cir. 1989) (affirming the rejection of a service agreement as a sound exercise of the debtor's business judgment when the bankruptcy court found that such rejection would benefit the debtors' estate); *see also In re Fed. Mogul Glob., Inc.*, 293 B.R. 124, 126 (D. Del. 2003) ("In general, motions to reject executory contracts are evaluated under the business judgment test."); *In re HQ Glob. Holdings*, 290 B.R. 507, 511 (Bankr. D. Del. 2003)

(“Under the business judgment standard, the sole issue is whether the rejection benefits the estate.”).

19. In applying the business judgment standard, bankruptcy courts give deference to a debtor’s decision to assume or reject contracts. *See, e.g., In re Fed. Mogul Glob., Inc.*, 293 B.R. at 126 (“The business judgment test dictates that a court should approve a debtor’s decision to reject a contract unless that decision is the product of bad faith or a gross abuse of discretion.”); *In re Caribbean Petroleum Corp.*, 444 B.R. 263, 268 (Bankr. D. Del. 2010) (quoting *In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001) (“[A] debtor’s decision to reject an executory contract must be summarily affirmed unless it is the product of bad faith, or whim or caprice.”). Courts defer to a debtor’s business judgment in rejecting an executory contract, and upon finding that a debtor has exercised its sound business judgment, approve the rejection under section 365(a) of the Bankruptcy Code. *See NLRB*, 465 U.S. at 523 (recognizing “business judgment” standard used to approve rejection of executory contracts).

20. Moreover, section 105(a) of the Bankruptcy Code provides that the Court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Section 105(a) allows the bankruptcy court to “craft flexible remedies that, while not expressly authorized by the [Bankruptcy] Code, effect the result the [Bankruptcy] Code was designed to obtain.” *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 235-36 (3d Cir. 2004) (citing *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003)). Section 105(a) therefore provides additional authority for the Court to grant the relief requested herein.

21. The Debtors submit that rejection of the Contracts effective as of the applicable Rejection Date is within the Debtors’ business judgment and an appropriate step in

furtherance of their efforts to preserve and maximize the value of their estates for all stakeholders. The Debtors have evaluated the Contracts in consultation with their professional advisors and determined that any benefits provided by these Contracts do not equal or exceed the costs associated with the Contracts. The Debtors currently are not operating their businesses and as a result, the Contracts are not necessary to their estates. In contrast, the Debtors' rejection of the Contracts will provide significant cost savings to their estates by terminating any further costs and obligations.

22. Accordingly, the decision to reject the Contracts is a proper exercise of the Debtors' business judgment, and rejection of the Contracts therefore should be approved pursuant to section 365(a) of the Bankruptcy Code.

23. Courts in this district have routinely granted relief similar to the relief requested herein. *See, e.g., In re Carbonlite Holdings LLC*, 21-10527 (JTD) (July 14, 2021) [D.I. 714] (authorizing debtors to reject certain executory contracts effective as of the rejection date); *In re Lighthouse Resources Inc.*, 20-13056 (JTD) (Jan. 26, 2021) [D.I. 270] (authorizing debtors to reject certain executory contracts and unexpired leases effective as of the rejection date); *In re Lucky's Market Parent Company, LLC*, 20-10166 (JTD) (April 9, 2020) [D.I. 587] (same); *In re THG Holdings LLC*, 29-11689 (JTD) (Oct. 10, 2019) [D.I. 343] (same).

B. Deeming Each Contract Rejected Effective as of the Rejection Date is Appropriate.

24. The Debtors also respectfully submit that it is appropriate for the Court to deem the Contracts rejected effective as of the Rejection Date.

25. Section 365 of the Bankruptcy Code does not restrict a bankruptcy court from applying rejection retroactively. *See SCS Co. v. Peter J. Schmitt Co.*, 1995 WL 1772010, at *2 (D. Del. May 15, 1995) (noting that a bankruptcy court has authority to select a retroactive date for the effective date of a lease's rejection); *see also In re Rupari Holding Corp.*, 2017 WL

5903498, at *6 (Bankr. D. Del. Nov. 28, 2017) (authorizing rejection of employment agreements effective as of a date before the debtor filed the motion to reject the same where debtor unequivocally communicated to the employees that it no longer required their services at the closing of the sale).

26. Courts in this district and elsewhere have held that a bankruptcy court may, in its discretion, authorize rejection retroactively to a date before entry of an order authorizing such rejection where the balance of equities favors such relief. *See In re Thinking Machs. Corp.*, 67 F.3d 1021, 1029 (1st Cir. 1995) (“[R]ejection under section 365(a) does not take effect until judicial approval is secured, but the approving court has the equitable power, in suitable cases, to order a rejection to operate retroactively.”); *In re Chi-Chi’s, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (stating “the court’s power to grant retroactive relief is derived from the bankruptcy court’s equitable powers so long as it promotes the purposes of § 365(a)”; *In re CCI Wireless, LLC*, 297 B.R. 133, 140 (D. Colo. 2003) (holding that a “court has authority under section 365(d)(3) to set the effective date of rejection at least as early as the filing date of the motion to reject”).

27. Furthermore, section 105(a) of the Bankruptcy Code provides that the Court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

28. In this instance, the balance of the equities favors the rejection of the Contracts effective as of the applicable Rejection Date. Without a retroactive date of rejection, the Debtors may be forced to incur unnecessary administrative costs for Contracts that do not provide any benefits to the Debtors and their estates. The Contract counterparties are not harmed by rejection prior to the date of entry of an order by this Court because they are each on notice as of filing of the Motion, and can as of that date start preparing for rejection and mitigating

damages. Additionally, pursuant to the *Order (I)(A) Establishing Deadlines for Filing Non-Customer and Government Proofs of Claim and Proofs of Interest and (B) Approving the Form and Manner of Notice Thereof and (II) Granting Related Relief* [D.I. 1519] (the “Bar Date Order”), each Contract counterparties will have 30 days from the date of service of notice of entry of the Order approving the rejection of its respective Contract to file a proof of claim for damages arising out of the Debtors’ rejection of the Contracts.

29. Courts in this district have routinely granted relief similar to the relief requested herein. *See, e.g., In re Carbonlite Holdings LLC*, 21-10527 (JTD) (July 14, 2021) [D.I. 714] (authorizing debtors to reject certain executory contracts effective as of the rejection date); *In re Lighthouse Resources Inc.*, 20-13056 (JTD) (Jan. 26, 2021) [D.I. 270] (authorizing debtors to reject certain executory contracts and unexpired leases effective as of the rejection date); *In re Lucky’s Market Parent Company, LLC*, 20-10166 (JTD) (April 9, 2020) [D.I. 587] (same); *In re THG Holdings LLC*, 29-11689 (JTD) (Oct. 10, 2019) [D.I. 343] (same).

Compliance with Bankruptcy Rule 6006(f)

30. Bankruptcy Rule 6006(f) establishes requirements for a motion to reject multiple executory contracts or unexpired leases that are not between the same parties. Rule 6006(f) states, in part, that such motion shall:

- (1) state in a conspicuous place that parties receiving the omnibus motion should locate their names and their contracts or leases listed in the motion;
- (2) list parties alphabetically and identify the corresponding contract or lease;
- (3) specify the terms, including the curing of defaults, for each requested assignment;
- (4) specify the terms, including the identity of each assignee and the adequate assurance of future performance by each assignee, for each requested assignment;

- (5) be numbered consecutively with other omnibus motions to assume, assign, or reject executory contracts or unexpired leases;
- (6) be limited to no more than 100 executory contracts or unexpired leases.

31. The Debtors respectfully submit that the relief requested in this Motion complies with the requirements of Bankruptcy Rule 6006(f).

Reservation of Rights

32. Nothing in this Motion: (a) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors or their estates; (b) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors or their estates to contest the validity, priority, or amount of any claim against the Debtors or their estates; (c) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors or their estates with respect to any and all claims or causes of action against any third party or (d) shall be construed as a promise to pay a claim or continue any applicable program postpetition, which decision shall be in the discretion of the Debtors. Any payment made pursuant to an order of the Court granting the relief requested herein is not intended to be nor should it be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

Notice

33. Notice of this Motion has been provided to: (a) the U.S. Trustee; (b) counsel to the Committee; (c) the Securities and Exchange Commission; (d) the Internal Revenue Service; (e) the United States Department of Justice; (f) the United States Attorney for the District of Delaware; (g) counterparties to the Contracts and (h) to the extent not listed herein, those parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be provided.

Conclusion

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court (a) enter the Order, substantially in the form attached hereto as Exhibit A, and (b) grant such other and further relief as is just and proper.

Dated: August 30, 2023
Wilmington, Delaware

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